PBPA Podcast Transcript
Episode 37 – Virtual Assistants:
Navigating Legal Considerations for a Stronger Partnership
(30:36 minutes)

Sireesha (00:01):

Employers are becoming increasingly creative with their employment arrangements. There are full-time employees, part-time employees, seasonal workers, independent contractors, and the list goes on. In today's episode of the PBPA Podcast, Chris Anderson and Will Collins will be focusing on a more recent trend, virtual assistants. If your nonprofit is considering outsourcing some administrative duties, listen up as we outline some important legal considerations and guidelines for working with virtual assistants.

Sireesha (00:42):

Hello and welcome to the PBPA Podcast. In each episode of the PBPA Podcast, we explore legal questions relevant to Georgia nonprofits. I'm your host Sireesha Ghanta, Counsel and Education Director at the Pro Bono Partnership of Atlanta. PBPA strengthens our community by engaging volunteer attorneys to provide nonprofits with free business legal services. We provide numerous free resources via our website, including articles and webcasts specific to Georgia nonprofits and their business legal concerns. We also provide direct legal services to our clients. For more information on client eligibility requirements, to apply to be a client or to access our vast learning center, visit our website at pbpatl.org. Before we jump into this episode's topic, keep in mind that this podcast is general information, not legal counsel, contact your attorney for guidance on your nonprofits' specific situation.

Sireesha (01:52):

Will Collins is an associate with Ogletree Deakins here in Atlanta. Will represents employers and organizations across the country and labor and employment litigation. Chris Anderson is a member of the Cross-Border Practice Group at Ogletree. His practice focuses on advising clients with cross-border employment strategy. Thank you both so much for being here today to talk to me about virtual assistants.

Will (02:19):

Thanks so much for having us.

Sireesha (02:22):

To start off, Will, can you briefly explain to anyone in our audience who is unfamiliar with the concept: What is a virtual assistant?

Will (02:32):

Absolutely, yes. So when I think about a virtual assistants, I think about a person or team of people who provide administrative services to clients, to organizations from a remote location, like a home office, for example. A virtual assistant might be tasked with scheduling appointments or making phone calls, making travel arrangements, or sending out mailings or emails. They're often connected with organizations through, um, things like postings or listings on job search sites like Indeed, Monster, or LinkedIn. They also might come to you or your organization through a referral or recruiting service like Robert Half, or maybe a virtual assistant specific site like Belay. And then what we've seen a lot of most recently is kind of the gig economy taking off. And where you have app-based marketplaces or platforms like Upwork or Thumbtack where you are connected with individuals to provide these services. And when we think about virtual assistants, historically, I think a lot of organizations have thought about these workers as independent contractors and non-employees.

Sireesha (03:48):

Okay. Will, you mentioned there, independent contractor versus employee. Let's step back for a moment and briefly talk about, I guess a more general employment topic: independent contractors and employees. Some of our listeners might think of these two groups as W-2s versus 1099s. How are these two classifications of workers different and why does it matter to a nonprofit?

Will (04:17):

Great questions. And let me first start with the why. You know, when we think about who our employees are, that impacts employee things like employee headcount, uh, for things like unemployment insurance, workers compensation. It also, you know, when we as employers, as organizations, we have obligations to our employees from things more administrative or legal requirements of record keeping, to things like how we pay them, how we compensate them, what training are we providing them, are we providing benefits? Um, and whether a worker is an employee or independent contractor informs those decisions. And specific to the compensation piece, but also the benefits piece, you know, there are potential consequences that organizations face if they're not classifying a worker correctly as an independent contractor. So if there's a judicial or an administrative determination that a virtual assistant was misclassified as an employee, an organization could be subject to penalties or liability for things including, wages, um, like minimum wage or overtime under the Fair Labor Standards Act, which is the federal, wage and hour law, depending on where the virtual assistant is sitting, there might be state law implications as well.

Will (05:40):

Uh, there could be liability for employee benefits, um, health insurance, holiday pay, retirement, uh, contributions, and also things like back taxes and penalties for federal or state income tax, social security, Medicare, and unemployment. Um, so that's really the why.

Will (06:02):

And then to address the, the first part of the question as to how contractors and employees are different. When I think about employees, the definition I like to provide and the lens I like to look at this, there's that employees, uh, typically personally perform work and are integrated into our organizations, their operations. They're receiving specific procedures, techniques, instructions, and trainings from employers. And, and usually it's for a long period of time, uh, or an indefinite period of time. When I think about independent contractors and we look at that under the law, independent contractors are outside or independent of our organization.

Will (06:51):

They're typically providing expertise or services, or roles that are not available inside our organizations. They're usually providing a discrete service for a limited period of time. So that, that's the general frame framework of how I think about employee and independent contractor. There are multiple tests, under the law, depending on what area we're talking about, that set forth factors or tests to determine whether a worker is an independent contractor or an employee. And, and, we'll, I'll talk about some of those tests in just a second, but really at the end of the day, there's no one rule or action that will determine whether a worker is an employee or an independent contractor. So getting back to, to the question of how an independent contractor or an employee are different and maybe how we make a classification decision, I'll just talk briefly about two of the test, and that's the FLSA test, which the "economic realities" test. And there are several factors under the economic realities test. The IRS uses the "right to control "test, which zoom back out the point here and, and then probably why we're having this conversation today is that it's, it is a, a sliding scale. It requires a careful consideration and assessment of risk

Sireesha ([08:26](#)):

With such tight budgets. We often hear about some of our nonprofits can be tempted to classify their workers as independent contractors to avoid the cost associated with employees. But in the long run, a mislabeled independent contractor can be a very costly mistake. And for our listeners, if you would like more information on some's tests that we'll just mention, I'm going to drop a link to some other resources that we have on our website that go into that in further detail. And now, Will, could you provide some examples of how these tests might be applied to virtual assistants?

Will ([09:12](#)):

So thinking about virtual assistants and this sliding scale that we've been talking about, on one end of the scale, there's an organization, let's call them organization A. They enter into a contract with Company X for virtual assistants services. And those services can be provided through one or more individuals employed by Company X. Also, assume that organization A is just one of several of company X's clients. So this virtual assistant service company has multiple together. This sounds more like your typical independent contract relationship. You have a company, multiple clients that are, the services can be provided through one or more individuals, and you're paying for the service as a whole. Paying for, you know, hourly pay services or dictating direction to an individual person.

Will ([10:16](#)):

On the other end, uh, you have, let's again, organization a say that they, this time, instead of contracting with a company, they, they connect with Bob, uh, who is a virtual assistant. And they engage him just to answer phones and prepare mailings based on a set script and some very specific directions and instruction organization that he tells Bob they expect him to be available nine to five Monday through Thursday, and that they'll pay him $10 an hour, uh, for his time that he's providing those services. They don't really know how long they'll need Bob, so they don't have an agreement and they don't limit how long Bob will provide those services. Uh, and this example, this looks more like an employment relationship. Cause organization a sets Bob's schedule and they tell him how to complete the work. They pay him an hourly wage, and either one of them can walk away without any notice or cost. Plus, when we think about whether, uh, Bob has the opportunity for profit or loss, you know, Bob really has no skin in the game here. So he, that factor would probably weigh against contractor status.

Will ([11:30](#)):

So those are kind of the two ends of the spectrum. And there's a lot that happens in the middle. Uh, if we tweak the facts slightly, it becomes a closer call. If organization any engages Bob and they have a contract for two months with the right to renew, and Bob is paid by the project, not by the hour, and Bob has the ability to accept or reject the project, he's free to set his own schedule. This moves us closer to the scale where we're comfortable with this looks like an independent contractor relationship. And again, if you tweaked it just even more slightly and you add the fact that, you know, maybe Bob has more clients, Bob doesn't just provide services to one to this one organization, that, that again moves us to safer ground. And so all this illustrates that it's a tough call and it requires weighing of risk and care, careful consideration as we make these decisions.

Sireesha (12:32):

Yeah. And sounds like it might also require, at the end of the day, some legal assistance to help determine if the classification is correct for the virtual assistant. So, well, going back to virtual assistants, if we're in a situation where the virtual assistant is, um, an independent contractor, does a nonprofit need to enter into a contract with that virtual assistant?

Will (12:59):

Absolutely. Um, and not only should a nonprofit enter into a contract with a virtual assistant., there should be, there's certain things that I would say are, must have in those contracts. Um, you wanna set forth the scope of the work, so what services are you going to ask them to provide? I also wanna consider including provisions that require the virtual assistants purchase insurance coverage, and indemnify you for any liabilities caused by the, uh, virtual assistants negligent or misconduct. You know, it's, it's important to include an expiration date, a term. We'd like to see a year or less really, um, to guard against any degree of permanency in that relationship. And again, that relates back to those tests that we were talking about earlier. You want to include a termination provisions and a notice period so that it's clearly defined in the contract when and how you can terminate the agreement. Um, and you wanna avoid any at-will language in the contract. Cuz again, if they are a contractor and not employee, the at-will language, it skews towards the employee relationship. So, um, want to have termination and notice period defined in that contract as well as addressing what constitutes a breach of the contract and ensure that we're not providing any additional benefits under the contract, such as like paid time off.

Sireesha (14:37):

And will, you mentioned at will language. Um, can you briefly clarify what does, what does that mean?

Will (14:45):

In a independent contractor relationship, these are, like... We talked about, they're for a short, discreet period of time or providing discrete service. That's not in definite and length and in an agreement, the relationship can only be terminated upon certain events occurring where that would amount to a breach of the agreement. Um, in the employment setting, uh, the relationship is indefinite and it can be terminated by either the nonprofit or the employee at any point in time, um, for any reason or no reason at all. And so that is the at-will language, so it can be terminated at any point in time, and that's what we wanna avoid.

Sireesha (15:37):

So what about if we have a situation where a nonprofit is working with a company to bring on multiple virtual assistants. Where it's not a situation where a nonprofit's just working directly with one person?

Will (15:52):

Using a company to do that is certainly a good thing, because you're contracting with an entity and not an individual.

Chris (16:01)

It tends to lessen all the risks we talked about, but it doesn't fully eliminate them. You still have to, if you're giving them benefits, assimilating them into your general workforce, giving them email addresses, you know, business cards, all of that kind of thing, you're still gonna be running that risk. But there is an intermediary there. And so it does tend to lessen it.

Will (16:29):

You know, ideally we're contracting with companies or separate legal entities, and we're established, we're contracting, and so we're not think about contracting with a, or contracting with a company. That's certainly a good thing. And what we're looking for, um, working with a company can minimize the risk, certainly, but, it doesn't, it doesn't completely eliminate a risk. If that company that you're contracting with is employing the virtual assistants, then the concern is not misclassification. But if that company that you're working with is also engaging these virtual assistants as independent contractors or putting it on you to make that decision, you're just, you're in the same boat. You can't contract away your obligations to properly classify and properly pay.

Sireesha (17:32):

So if an, if a nonprofit is working with a company, they should carefully review their contract., it sounds like, and make sure that there's some clarification on the virtual assistant and whether they're an employee of the company and not going to be potentially a contractor of the nonprofit.

Will (17:46):

That's right. You want, you wanna know what your obligations are and you wanna know what relationship you're in entering into.

Sireesha (17:58):

Mm-hmm. <affirmative>, who's responsible for what. And to that end, also, let's talk about payment. Is there a proper way for a nonprofit to document payment to a virtual assistant?

Will (18:05):

Yeah, so if a virtual assistant is, if you're a contractor, then the nonprofit needs to get a W-9 from the virtual assistant and they need to provide the virtual assistant, uh, 10 99 and document payments on a 1099. And if it's an employment relationship, it's the traditional w2.

Sireesha (18:37):

Okay. And my next question is around confidentiality. Um, what concerns exist around confidentiality and what can a nonprofit do to protect themselves, especially concerning that sometimes these virtual assistants might be having access to, uh, donor information or about some of the children that the nonprofit serves. What can a nonprofit do to protect themself with their confidential information?

Will (19:01):

You know, we're gonna assume that we have a contract because we listen to the podcast today and we have one in place. But that contract should also address confidentiality and non-disclosure of certain types of information. I should be sure to define what that information is. You know, what information you consider confidential and that's covered by any non-disclosure obligations that are in your contract. Looking differently, outline what is acceptable use of that information and then required destruction or return of that confidential information after the contract expires or it terminates. Um, and then, you know, think through and consider the data privacy, cybersecurity expectations. You wanna be clear what you expect them to do to safeguard your information. And you know, if these in these individuals are gonna be working remotely, so online, you want to know if they've had any unauthorized access or a breach of their network or their devices. Um, and so a lot of times we'll see in contract or recommend putting in contract language where, the nonprofit would be notified by the virtual assistant if there's been a potential breach. So you have an opportunity to assess and remedy the situation as best you can.

Sireesha (20:37):

I guess that even offboarding, I was just thinking about if your virtual assistant, if they leave, just making sure that you turn off access to whatever systems that they might have had access to, which is one thing that can be easily forgotten as someone is being off boarded, but so vital. And now my last question is for you, Chris. What about situations where a nonprofit is working with a virtual assistant that's located overseas? How does a nonprofit work with the pay, and accounting for payments when they're working with someone who's overseas and doesn't have the traditional information to provide like social security?

Chris (21:07):

Absolutely. Um, yeah, it is absolutely right because you can't, 1099 them, you can't, oh, unless they are, let me segue just for the small population of folks overseas that are US citizens or permanent residents who just happen to be overseas, then, then it will still be a 1099 process as long as they're providing their services as we're discussing today for the US entity. But assuming that's not the case in most cases, and it's gonna be someone who's a national of another country who's not a US citizen or a US permanent resident, um, a US person as it's defined by the, the tax authorities in the us, then you, they wouldn't get a 1099 and you would have to basically invoice them or they would invoice for the services and you pay them through accounts payable. So you wouldn't have them on payroll.

Chris (21:23):

You pay through accounts payable, which is another way to, to do a lot of what Will's talking about, is to keep them separate from the employee population. Show that it's a different type of relationship, a independent consultant relationship. And so you're, uh, they would submit an invoice as the ideal scenario on a monthly basis. In some countries that's required that they would submit an invoice. Um, even a lot of Latin American countries have government formatted invoices that would have to be submitted. So the submitted invoice you would pay based on that. And that's basically how, how the payroll will be done.

Chris (22:25):

But aside from that, just generally and quickly, generally looking at how to work with international virtual assistants from a, just at a high level. A lot of the things that Will talked about applied the IRS test, the direction of control tests, all of those tests would apply just in a modified basis. Different countries have different factors that they're gonna focus on. But really every country that I work with, and we work in over a hundred countries, is gonna have some test either driven by statute through the tax code or the court case law or some amalgam of all of those. Amalgamation of all of those things. Um, together they can apply in different scenarios. But the main risk that I just wanna highlight from an international standpoint, so outside the US when you're dealing with a virtual assistant for any listeners who are doing that, is you're dealing with the same employment risk where someone could bring a claim and usually this would happen when you break the relationship with them, it's, you know, 99 times out of a hundred, that's how it would rise up. And relationships do break unfortunately sometimes. But when you go to break that relationship, then they say, well, I know you, we've called me a contractor and they may have gotten tax benefits from that and a lot of other benefits, but at that point they're not gonna remember that. They're gonna say, well, I think I was treated as an employee, you're not gonna bring a claim for my employment entitlements. And unlike the US it's just a very big distinction to make where we have at will employment that Will talked about and Sireesha talked about. Outside the US there's really not at will employment. There's some countries that have a similar equivalent, but nothing, nothing coming to that level of truly at will employment. So, so you can't terminate because a person has an employment contract except for specified grounds to be able to terminate.

Chris ([23:38](23:38)):

And then also outside the US there are a lot more, by and large, a lot more employment entitlements than people. So annual leave profit sharing and for our listeners non-profit status that that wouldn't apply as much. But, um, but annual leave, sick leave, um, lots of dedicated maternity leave overtime regimes are very, um, specified. And then notice and severance importantly, so when you go break that relationship, there are contractual obligations and statutory obligations that are there. If someone truly was a misclassified contractor and they're really in function an employee.

Chris ([24:12](24:12)):

And then aside from employment risk, just would highlight the payroll tax risk. Um, especially, and there's other risks we talked about data privacy, data risks, um, outside, if someone's sitting in Europe, for example, and they're a European national in the EU, then GDPR is gonna apply to them. And, and so there are data privacy considerations when you're taking that person's information into any US system of, uh, of, of holding that information or collecting it or storing it.

Chris ([25:11](25:11)):

Um, but the main risk I want to raise right now, aside from employment is the payroll tax risk. And that's where someone sitting in that, that country, if they truly are an employee, does the, the employee entity have a responsibility to withhold and remit income tax on their behalf, social insurance contributions on their behalf, all of these things. And every country is, is gonna be a different analysis.

Chris ([25:39](25:39)):

But I just recommend to analyze lots of different areas including data privacy and, and some of the, but especially employment and payroll, those are the big two big buckets that you always wanna analyze when you're using a contractor and just see where that risk lies. And Will, a big point you made, which I fully agree with, is that you just don't want to use these on an indefinite basis on a global scale. We still recommend 12 months or less in certain countries, we recommend six months or less. It really is gonna depend on what services they're doing first and foremost, and other things like if they've, if they've gotten an entity in place or a sole proprietorship to provide the services that can help. Um, but even then sometimes that won't win the day if they're still truly misclassified in what they're doing and across outside the US the misclassification, the main factor is direction and control. And if you're directing and controlling the activities of that person, especially if they're doing it in individually without an entity, at least a sole proprietorship, if not a subsidiary, then they're going to be able to bring a claim and try to bring a claim if and when that relationship breaks and say, I was really an employee. And, and so that risk is there. So you don't wanna let it go on indefinitely. And we recommend capping that as much as possible and continues to reevaluate the relationship. And then ultimately to think about other options such as using a staffing agency, a professional employer organization, a PEO, or setting up your own entity if there's a critical mass of people that you're getting.

Chris (27:05):

And then one final option that's worthy of raising is if you are doing this in a European country, not every European country, but most of the countries in the EU allow com companies outside or institutions out entities outside the EU of that country to register as a resident, non-resident employer. So you can get a tax ID number and you can do run payroll using a payroll agent. And it's much less expensive typically than using a PEO or staffing firm, which typically a staffing firm's gonna be 10 to 15% on top of salary, whereas a payroll company will be a fine out or a definite cost each month this much less than that typically. And so you could register and as long as you're not doing any kind of, uh, including contracts generating income in that country, which likely you wouldn't be using a virtual assistant, right, um, then you can feel good that you're not gonna have a permanent establishment risk. You still recommend getting tax opinions on that of course. Um, but that being the case, and you can get a tax ID number without incurring a lot of extra risk, and then you can legitimately employ that person.

Chris (28:03):

So this is something, for just one quick hypothetical. Say you have someone and they finish their six months or a year and you just love their relationship and it's going really well, but you know they're doing something that that other employees in your organization are doing and they're kind of tied into that and that they're fully at your direction control and they're exclusively providing services for you and not for any other clients. And they're doing that on a full-time basis for a set monthly fee. That's the probably four or five main factors I just listed there. If all those things are checked, then ultimately you'd want to pivot and say either we, we need to functionally employ this person. So if we're not in a European country or other country, we can register as non-resident employer, we're gonna consider using a PEO that will, as we distinguish earlier, one that's gonna employ that person, not just make them their contractor, but truly employ them. Take that employment box, take that payroll box, make sure we're meeting all those, those requirements. And then if it's the country where we could register as a nonresident employer and we figure out that the cost savings on balance is better to get with that end, to tick those boxes of employment and payroll tax ourselves, you get better protection on IP and confidentiality data privacy. There's a lot more streamlined effect there. So those are two really good options that, you can kind of arrows in your quiver. You can have once you've gone through a few months to a year of this relationship and see that it's working well and you want to continue it. So that you don't wind up five, 10 years down the road realizing you've had a contractor all that time.

Sireesha (29:31):

I learned so much today. Guys, thank you Will and Chris for sharing your expertise with us. I know as employers are looking for different options to meet their employment needs, this insight will be so helpful for our nonprofit audience. Thanks for being here with us today.

Chris (29:51):

Thanks so much.

Will (29:52):

Yeah, thanks so much.

Sireesha (29:20):

We hope that you found this episode of the PBPA Podcast to be informative and helpful. We add new episodes every month with short conversations about general, yet important legal information for Georgia nonprofits. Remember that this is not legal counsel. Talk to your attorney about your organization's specific concerns. Thanks for tuning into the PBPA Podcast. And to all nonprofits listening out there, thank you for all the good work you continue to do in our community.